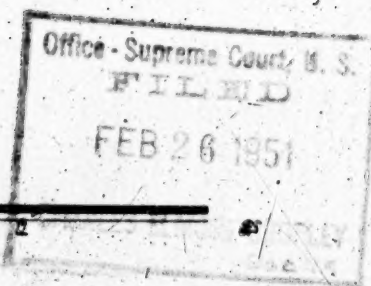


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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1950

\_\_\_\_\_  
No. 146  
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ALABAMA PUBLIC SERVICE COMMISSION, ET AL., *Appellants,*

v.

SOUTHERN RAILWAY COMPANY, *Appellee.*

\_\_\_\_\_  
**REPLY OF SOUTHERN RAILWAY COMPANY TO  
REPLY AND SUPPLEMENTAL BRIEF FOR  
APPELLANTS.**  
\_\_\_\_\_

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**REPLY OF SOUTHERN RAILWAY COMPANY TO  
REPLY AND SUPPLEMENTAL BRIEF FOR  
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---

Appellee railway in reply to the reply and supplemental brief filed on behalf of appellants submits that:

I. Appellants err in arguing that this suit is barred by the Eleventh Amendment to the Constitution of the United States.

II. Appellants err in arguing that the decree of the district court unduly circumscribes the state commission's actions.

III. Appellants err in arguing that the Supreme Court of Alabama has not defined the guides to be observed by the state commission.

**APPELLANTS ERR IN ARGUING THAT THIS SUIT  
IS BARRED BY THE ELEVENTH AMENDMENT  
TO THE CONSTITUTION OF THE UNITED  
STATES.**

Appellants come now and for the first time aver and argue that the instant suits are in substance actions against the State of Alabama and as such are barred by the Eleventh Amendment to the Constitution of the United States. For that reason they claim the three-judge district court below erred in failing to dismiss the suit. In support of their argument appellants advance the proposition that where a state has not consented to be sued, and if it is the real party in interest a suit against state officers who are merely nominal parties will not avoid the limitations of the Eleventh Amendment. They cite *Ford Motor Co. v. Department of Treasury*, 323 U. S. 459 (1945), *Kennecott Copper Corp. v. State Tax Commission*, 327 U. S. 573 (1946); and *Great Northern Life Insurance Co. v. Read*, 322 U. S. 47 (1944). In all these cases although the suits were brought against state officers the result of a judgment against the state officers would involve payment from the state treasury and were thus in fact suits against the state.

It is the position of the railway in the instant case that the Alabama Public Service Commission has issued an unconstitutional order under color of state law and the railway's action is against the members of the Commission for so doing and against the Attorney General to prevent his enforcement of their unconstitutional order. The railway submits that the line of cases landmarked by *Ex Parte Young*, 209 U. S. 123 (1908), which established the theory that a state officer seeking to enforce a state act which violates the Federal Constitution is stripped of his official or representative character and subjected in his person to the consequences of his individual conduct, supports our action in the instant cases. We submit that there is no practical difference between a state officer's or agency's

trying to enforce a state statute which violates the Federal Constitution and its issuing an order which is unconstitutional. Both are parts of the legislative process, both injure the victim in the same way. In fact where an officer applies a valid statute in an unconstitutional way he would seem to be even further removed from the protection of the state's immunity than in the former case.

By acting unconstitutionally an officer exceeds his authority, especially where the statute is constitutional. The state which could not by legislation enact an unconstitutional statute, certainly could not cast its cloak of immunity over an officer who applied a constitutional statute in an unconstitutional way. Acting unconstitutionally is more than an error in judgment. It is a violation of a fundamental right protected by the United States. The appellants' argument that the railway does not come within the exception of *Ex Parte Young, supra*, if sustained, would nullify the provision in the judicial code Title 28 U.S.C. Section 2281 which provides for injunctions restraining the action of any officer of a state in the enforcement or execution of an order made by an administrative board or commission acting under a state statute. Too many cases have been decided in the last forty years under this section and its predecessor, section 266, to permit serious consideration at this time of such an argument as that now made by appellants.

The recent case, *Larson v. Domestic and Foreign Corp.*, 337 U. S. 682 (1949), cited by appellants, held that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign whether or not they are tortious under general law. This Court distinguished that case, however, from those cases in which the issue of unconstitutional action on the part of a governmental officer or agency is raised (pages 691, 696, 697, 698-699, 703).

The Court in the *Larson case* acknowledged that where constitutional rights are infringed by the actions of officers of the government, it is proper that the Court have power

to grant relief against those actions. The Court has granted such relief in the following cases in which the issue was the unconstitutionality of the action of an officer of the Government. *United States v. Lee*, 106 U. S. 196 (1882); *Noble v. Union River R. Co.*, 147 U. S. 165 (1893); *South Carolina v. Wesley*, 155 U. S. 542 (1895); *Mississippi R. R. Comm. v. Illinois Cent. R. R.*, 203 U. S. 335 (1906); and *Tindal v. Wesley*, 167 U. S. 204 (1897).

In *Mississippi R. R. Comm. v. Illinois Cent. R. R.*, *supra*, the issue was the constitutionality of an order of a railroad commission. No question was raised concerning the validity of the statute under which the commission functioned. The point was made, and rejected by this Court, that it was a suit in substance against the state. This Court found that a commission created by a state under the authority of its constitution and laws for the purpose of supervising and to some extent controlling the acts of railroads operating within the state is subject to suit by a citizen.

The holding in the *Larson case* is no support for appellants' argument. The distinctions made in the opinion clearly show the validity of the railway's position based on principles laid down in *Ex Parte Young*, *supra*; *Mississippi R. R. Comm. v. Illinois Cent. R. R.*, *supra*; *Western Union Telegraph Co. v. Andrews*, 216 U. S. 165 (1910); *Herndon v. Chicago, R. I. & Pac. Ry. Co.*, 218 U. S. 135 (1910); *Harrison v. St. Louis & S. F. R. Co.*, 232 U. S. 318 (1914); *Looney v. Crane Co.*, 245 U. S. 178 (1917); and *Public Service Company v. Corboy*, 250 U. S. 153 (1919).

## II.

### **APPELLANTS ERR IN ARGUING THAT THE DECREE UNDULY CIRCUMSCRIBES THE STATE COM- MISSION'S ACTIONS.**

If one can visualize the state commission's hands being tied down by the permanent injunction issued in this case as complainants argue, three very practical aspects of such picture immediately present themselves—First, how does

it happen that this discovery has now been made after, say, forty years of actual experience with the granting of just such injunctions? And, second, how does it happen that such dire result was not argued in the district court and in appellants' initial brief in this Court? And, third, how does it happen that appellants see this result, whatever it may be, from the injunction granted in the district court and failed to see exactly the same result should the state court (into whose hands appellants vainly strive to throw this case) enjoin or supersede the Commission's order? But if the state statutes do not contemplate an injunction and the supersedeas provided merely suspends but does not restrain, then it undoubtedly follows appellee railway was and is without any prompt and adequate remedy in the state courts.

That appellants have erred in ascribing to the decree in question the all encompassing scope whereby the federal court would be interfering with the proper functions of the Alabama Public Service Commission is clearly shown in the second sentence of the decree (R. 69) where it is stated that the decree is based upon the evidence offered in this case. The federal court has not interfered or attempted to interfere with the Commission's proper exercise of its functions, nor restrained it in any way beyond the factual situation involved in this cause.

### III.

#### **APPELLANTS ERR IN ARGUING THAT THE SUPREME COURT OF ALABAMA HAS NOT DEFINED THE GUIDES TO BE OBSERVED BY THE STATE COMMISSION.**

We refer to *Alabama Public Service Commission v. Western Union Telegraph Co.*, 203 Ala. 243, 94 So. 472 (1922), which held as follows:

"The valid orders of a public service commission will be enforced in the courts, and orders not author-

ized by law are unenforceable.<sup>1</sup> The final test of validity or invalidity of the order is whether, when all the circumstances that are relevant and material to same as duly presented are considered, the order is reasonable or unreasonable.<sup>2</sup>

"In the finding of the state court, when the conclusion of law and finding of facts are intermingled so as to make it necessary in order to pass upon the question, the Supreme Court of the United States will analyze the facts."<sup>3</sup>

We also refer to *Alabama Public Serv. Com'n. v. Atlantic Coast Line R. Co.*, 253 Ala. 559, 45 So. 2d 449 (1950) wherein Mr. Justice Foster delivered the unanimous opinion of the Supreme Court of Alabama. At pages 450-451, he said:

"When that duty is not *imperative*, but what is called *relative*, as in Alabama, in order to justify a reduction of the service, the carrier is not required to show that the rate of return on the system requires the reduction, or that it would impede interstate commerce, but it is sufficient if the reduced plan would supply such train service as the public necessities demand and require. *Delaware L. & W. R. Co. v. Van Santvoord*, D. C., 232 F. 978, and cases last above cited, including *Atlantic Coast Line R. R. v. Public Service Comm.*, D. C., 77 F. Supp. 675, 685. In the language of our statute, is 'reasonable and just.' Title 48, section 104, Code.<sup>4</sup> 'It is evident that the public service agency is

Footnotes 1, 2, and 3—omitted authorities.

<sup>1</sup> *Miss. R. Com. v. M. & O.*, 244 U. S. 388, 37 Sup. Ct. 602, 61 L. Ed. 1216; *Interstate Comm. Com. v. L. & N.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431, 433; *Interstate Comm. Com. v. Nor. Pac.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308; *Miss. R. Com. v. I. C.*, 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209.

<sup>2</sup> *R. R. Com. v. Ala. North.*, 182 Ala. 357, 364, 62 South. 749; *R. R. Com. of Ala. v. A. G. S.*, 185 Ala. 354, 64 South. 13, L. R. A. 1915D, 98; *Miss. R. Com. v. M. & O.*, 244 U. S. 388, 37 Sup. Ct. 602, 61 L. Ed. 1216.

<sup>3</sup> *Jones Nat. Bank v. Yates*, 240 U. S. 541, 552, 553, 36 Sup. Ct. 429, 60 L. Ed. 788; *Nor. Pac. v. North Dakota*, 236 U. S. 585, 593, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; *Traux v. Corrigan*, 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254.

<sup>4</sup> Printed in Appendix, with penalty section 399, 400, 405, and 406.

under no obligation to continue to offer a service which the public will not use, where the offer is a financial burden, and where it is unreasonable to demand its continuance.' *Thompson v. Boston & Maine R. R.*, 86 N. H. 204, 166 A. 249; *Atlantic Coast Line R. R. v. Public Service Comm.*, *supra* 77 F. Supp. at page 684.

"Another statement of the principle is that although the operation of the entire system yields a net profit, the loss resulting from the maintenance of a certain service on a particular branch must be of sufficient importance to outweigh the inconvenience which the public will suffer as a result thereof. 123 A.L.R. 928; *Thompson v. Boston & Maine R. R.*, *supra*; *Delaware L. & W. R. Co. v. Van Santvoord*, *supra*.

"Again, it is said: 'The controlling criteria as we see it are these, the character and population of the territory served, the public patronage, or lack of it, the facilities remaining, the expense of operation as compared with revenue from same, and the operations of the carrier as a whole.' *Atlantic Coast Line R. R. v. Public Service Comm.*, D. C., 77 F. Supp. 675, 684."

And Mr. Justice Foster further said at page 452:

"The questions for us on this appeal are, whether the commission erred in applying the law to the facts found (including due process), or whether the order was based on a finding of facts contrary to legal evidence of substantial weight, *Alabama Public Service Comm. v. Southern Bell T. & T. Co.*, 42 So. 2d 655, unless we find it expedient to remand the case to the commission for further proceedings or evidence. Title 48, section 82, Code."

From those two decisions it appears that the Supreme Court of Alabama has fully and clearly defined the guides to be observed by the Alabama Public Service Commission in performing its functions under the state statutes. There was no need for the three-judge district court to abstain from exercising its jurisdiction or to stay its hand pending any state court proceedings. And it will be further noted that the state supreme court recognized and held that the

Public Service Commission was *applying* the state law with-  
in the meaning of the language used by this court in decid-  
ing *Ex Parte Bransford*, 310 U. S. 354 (1940), so that a  
United States district court of three judges was essential.

We say with the utmost confidence that the railway's  
complaint in the district court fully and clearly pleaded a  
cause in equity and further that appellee had no remedy at  
law available in the federal court or in the state court.  
The state procedure for reviewing orders of the Alabama  
Public Service Commission, Sections 79, et seq., of Title 48,  
Alabama Code, 1940, is inadequate to afford appellee the  
relief it necessarily had to have to deal with the factual  
situation in our cases. If it should be thought such statu-  
tory procedure was adequate, we submit that assumption  
would be in error. The statutory review procedure  
was before the Supreme Court of Alabama in *Bir-  
mingham Electric Company v. Alabama Public Service  
Commission*, — Ala. —, 47 So. 2d 449 (1950) and *Bir-  
mingham Electric Company v. Alabama Public Service Commis-  
sion*, — Ala. —, 47 So. 2d 455 (1950). The order of the  
Alabama Public Service Commission in that litigation was  
entered on March 19, 1948. The judge of the Circuit Court  
of Montgomery County granted an application for super-  
seedeas and approved the bond filed, this being a rate case  
(47 So. 2d at 457). That proceeding was remanded to the  
Commission for taking of further evidence (47 So. 2d at  
470). Unless there is some remedy somewhere, appellee  
railway, in the case at bar, tested by what happened to the  
Birmingham Electric Company, would have been running  
its trains and suffering tremendous losses from 1948 to  
1950, and would still be running them pending a further  
hearing, whenever it suited the Alabama Commission to  
set the case, and then start all over again seeking a review  
in the Circuit Court of Montgomery County. It is not sur-  
prising that the railway sought the protection of the federal  
court, when confronted with the peremptory order of the  
Alabama Commission of December 5, 1949, entered on the  
citation that it issued, after denying the railway a hearing

thereon. For that order required restoration of the trains as of that date. And finally when confronted with the order of January 9, 1950, denying the application, the railway had to comply by restoring the trains or keep them off and risk the penalties.

#### IV.

#### CONCLUSION.

Appellants' Reply and Supplemental Brief adds nothing to their case. We submit the decree of the district court should be affirmed.

Respectfully submitted,

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## APPENDIX.

## Title 48, Code of Alabama 1940

“§104. (9629; 9823) (5651) (3490) (1129) *Commission charged with duty of regulating and controlling transportation companies.*—The public service commission is charged with the duty of supervising, regulating, and controlling, all transportation companies doing business in this state, in all matters relating to the performance of their public duties, and their charges therefor, and of correcting abuses therein by such companies, and the commission shall, from time to time, prescribe and enforce against said transportation companies, in the manner herein authorized, such rates, charges, classifications of freight, storage, demurrage, and car service charges, rules, and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the commission may, from time to time, alter or amend. All rates, charges, classifications, rules, and regulations adopted or acted upon by any transportation company inconsistent with those prescribed by the commission acting within the scope of its authority, or inconsistent with those prescribed by any statute, shall be unlawful and void. And the commission shall enforce and require compliance with all the provisions of all laws now in force or hereafter enacted regulating railroads and other transportation companies or prescribing the duties thereof.”

“§ 399. (5392) *Penalty for charging excessive rates, granting rebates, or violating commission's orders, etc.*—Any utility doing business in this state, or any of its authorized agents, officers or employees, who is guilty of knowingly or willfully charging, demanding, or receiving any rate or charge for any commodity or service different from that authorized by its lawful tariffs on file with the Alabama public service commission, or who is guilty of knowingly or willfully granting or giving to any person or persons any concession or rebate in respect of its lawful charges or rates, or who knowingly or willfully violates, or procures, aids or abets a violation of, any lawful order or decree of said commission, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more

than one thousand dollars for each offense. In the case of a violation of said commission's orders or decrees, each day's violation shall be deemed to be a separate offense."

"§ 400. (5350) *Violations of statutes as to reasonable rates, adequate service and unjust discriminations; penalty.*—Every officer, agent, or employe of such common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of the public service commission, or any provisions of any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court."

"§ 405. (5399) *Violating orders of public service commission; penalty for.*—Every officer, agent or employe of any common carrier or corporation, who shall violate, or who procures, aids or abets any violation of, or who shall fail to obey, observe or comply with any order of the public service commission, or any provisions of any order of the commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe and comply with any such order or provision, shall be guilty of a misdemeanor, and upon conviction shall be fined a sum not exceeding five hundred dollars for each offense to be fixed by the court or judge trying the case."

"§ 406. (5400) *Venue of prosecution or indictment.*—Any officer, agent or employe shall be subject to indictment or prosecution in any county in which a subordinate agent or employe of the common carrier violates any of the provisions of this Code relating to the public service commission, or any rule or order of the public service commission, by the direction or in consequence of the direction of such officer, agent or employe.